

## STATEMENT OF CONSIDERATIONS

ADVANCE WAIVER OF DOMESTIC AND FOREIGN INVENTION RIGHTS UNDER DOE INTERAGENCY AGREEMENT NO. DE-AI02-07ER25819, AND NNSA INTERAGENCY AGREEMENT DE-AI01-05NA26054, WITH DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (DARPA) UNDER THE DARPA HIGH PRODUCTIVITY COMPUTING SYSTEMS PROGRAM - W(A)-07-007, CH-1396

The Defense Advanced Projects Research Agency (DARPA) High Productivity Computing Systems (HPSC) is a multi-year, multi-phase research and development effort. It has two goals: 1) developing a new generation of economically viable high productivity computing systems for national security and industrial user communities by 2011; and, 2) ensuring the United States lead, dominance and control in the critical technology. The DOE Office of Science (SC), the National Nuclear Security Administration (NNSA), and the National Security Agency are Mission Partners in the HPSC program and are contributing funding to help DARPA support two vendors in Phase III. DOE Office of Science will provide \$13 million of funding in FY2007 through FY2010 to cofund the DARPA Phase III award to Cray, Inc. The NNSA will provide funding to DARPA through the above referenced interagency agreement. DARPA will provide \$250,000,000 to Cray Inc to fund their HPCS Phase III proposal titled "Cascade: High Productivity Adaptive Computing." Cray is cost-sharing the amount of \$125,000,001 for a total cost of \$375,000,001. Additional funding will be provided by the National Security Agency. This waiver is addressed only to DARPA's support of Cray by the above referenced DOE and NNSA Interagency funding agreements.


DARPA and Cray entered into an Other Transactions Agreement (OTA) to perform the above-described work. Under the OTA with DARPA, Cray receives title to Subject Inventions. DOE intends to co-fund this work via a Funds-Out Interagency Agreement to DARPA. Under DOE's patent statute (42 U.S.C. 5908), title to any inventions of Cray vest in the United States. Therefore, the patent provisions of the proposed interagency agreement, provide that title to subject inventions vests in the United States, which is inconsistent with Cray's agreement with DARPA. This waiver is necessary therefore, to provide consistency between this interagency agreement and the OTA, ensuring that title to subject inventions can vest in Cray. It is not necessary in this instance for a waiver petition from Cray: because there is no agreement between DOE and Cray, and DARPA is the lead agency in this matter.

In accordance with the authority of Section 152 of the Atomic Energy Act of 1954 (42 U.S.C. 2182) as amended, and Section 9 of the Federal Non-Nuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908), it is believed to be in the best interest of the United States and the general public to grant an Advanced Waiver to subject inventions made by Cray under the DARPA OTA.

The OTA is subject to the usual Government advance patent waiver licensing provisions, and the government license, march-in rights, and preference for U.S. industry provisions set out in 35 U.S.C. 202-204. A U.S. Competitiveness clause is not required because the interagency agreement between DOE and DARPA addresses this issue, and DOE is deferring to DARPA as the lead agency. There is no agreement between DOE and Cray.

The grant of this Class Waiver should not result in adverse effects on competition or market concentration. Waived inventions will be subject to a royalty-free license to the Government and the Government has the right to require periodic reports on the utilization, or the efforts at obtaining utilization, that are being made for the waived inventions. If Cray is not making reasonable efforts to utilize a waived invention, the Government can exercise its march-in-right and require licensing of the invention.


In view of the statutory objectives to be obtained and the factors to be considered under DOE's statutory waiver policy and regulations, 10 CFR 784, the objectives of Public Law 101-189, and Executive Order 12591, all of which have been considered, it is believed that the Advance Waiver as set forth above will best serve the interest of the United States and the general public. It is therefore recommended that the waiver be granted.


  
Mark Dvorscak  
Deputy Chief Counsel  
Office of Intellectual Property Law, CH

Date: March 12, 2007


Based upon the foregoing, it is determined that the interests of the United States and the general public will best be served by a waiver of patent rights of the scope described above, and therefore the waiver is granted. This waiver will not apply to any modification or extension of the interagency agreement, where through such modification or extension, the purpose, scope or cost of the interagency agreement has been substantially altered.

CONCURRENCE:

  
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